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In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO 89
AND GALLUP-McKINLEY COUNTY PUBLIC
SCHOOL DISTRICT NO 1

Petitioners,

v

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent,

NEW MEXICO STATE DEPARTMENT OF EDUCATION,

Intervenor

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

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OTHER:

Journal of Law, Probability and Risk (2006) Vol 5, 33-61 (Advanced Access Publication January 15, 2007) "A 60 Million Dollar Statistical Issue Arising in the Interpretation and Calculation of a Measure of Relative Disparity Zuni Public School District 89 v U S Department of Education" 4

ARGUMENT

The Petitioners respectfully request pursuant to Supreme Court Rule 44 that this Court grant a rehearing and reconsideration of the majority's ruling as issued on April 17, 2007 (550 U S ___ (2007))

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The majority and the dissenting Justices all agree that the question whether the Secretary's 1996 regulatory version of the 25% disparity formula established by Congress in 1994 is valid turns on whether the statutory formula requires that the disparity test be applied to a ranking, an array or a distribution of LEAs based on each LEA's average per-pupil expenditures or revenues after excluding those LEAs whose average revenue or expenditure values fall above the 95th or below the 5th percentiles of that array (in which case the Secretary's formula is not valid), or whether the statutory formula permits that test to be applied to this same ranking, array or distribution of LEA's after weighting each LEA by their number of pupils This is equivalent to a calculation based on an assumption that each pupil within an LEA receives identical funding[1] (in which case the Secretary's formula is valid)

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[1] As the State admitted, (Resp Br at 37-41) the Secretary's formula produces the same result as (and thus is the mathematical equivalent of) a formula which applies the disparity test to a ranking, an array or a distribution of pupils based on a (hypothetical) per-pupil annual revenue or expenditure after excluding those pupils whose revenue or expenditure values fall above the 95th or below the 5th percentiles of that array

The majority determined that the statute could be read to permit the Secretary to make the disparity determination by using the number of pupils as a weighting factor in the ranking of LEAs by their average revenue or expenditure rather than using the unweighted ranking of LEAs by their average revenues or expenditures

The dissenting Justices firmly concluded that the statute requires this disparity determination to be made based on an array, ranking or distribution of LEAs not on the basis of an array, ranking or distribution of individual students

A compelling factor underlying the majority opinions was a belief in the superiority of the Secretary's formula over the statutory formula Additionally, Justice Breyer's opinion and the concurring opinions of Justices Kennedy and Alito found an ambiguity in the statute which is relied upon to avoid a conflict with *Chevron U S A , Inc v Natural Resources Defense Council, Inc* , 467 U S 837 (1984) [2] Justice Stevens

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[2] The drafters had before them a legislative and regulatory history which described two distinct formulae for determining permissible per student disparity among LEAs - one formula was ultimately embodied in 1976 regulation which included the percentile of student populations and a competing formula, subsequently adopted in the 1996 statute, where this additional step is purposefully omitted The necessary suggestion of the majority is that Congress was inattentive and allowed a Secretary, who purportedly drafted the statutory formula as an embodiment of his regulation formula, to utterly fail in the effort, calling for the majority's judicial rescue However, Congress was active in the 1994 legislative effort in this area, leading to the conclusion that the statutory language was intentional The prior "wealth and neutrality test" which measured the tax burden of all tax payers in the state and the "special circumstances test" which allowed for specific exemptions, were

invoked *The Church of the Holy Trinity v United States*, 143 U S 457, 459 (1982) in his concurring opinion [3]

Justice Breyer's Opinion, however, noted a belief that the statutory provisions establishing the disparity formula were complicated and implied that a different result might be warranted if in the view of professional statisticians the statutory language could not properly be read to permit the formula adopted by the Secretary

> Finally, we draw reassurance from the fact that no group of statisticians, nor any individual statistician, has told us directly in briefs, or indirectly through citation, that the language before us cannot be read as we have read it The circumstance is significant, for the statutory language is technical, and we are not statisticians and the views of experts (or their absence)

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both eliminated by Congress, leaving only the "disparity test" which was before this Court Further, the House version of the bill provided for only a 10% disparity standard H R 6, 103rd Cong (1994), *see also*, H R Rep No 103-495 at 2887 The Senate version (S 1513, 203rd Cong (1994) at Section 9010 would leave the Secretary with his former powers S Rep No 103-292 at 44,98 Following a conference, the House version dropped the disparity percentage from 25% to 20% for the fiscal years 1998 and 1999 H R No 103-761 (1994) (Conf Rep at 798-799) Subsequently, however, Senator Kassebaum from Kansas, one of the three states that still takes credit for Impact Aid, added an amendment to another bill keeping the 25% disparity percentage Pub L No 104-195, 110 Stat 2379

[3] Justice Stevens' concurring opinion agreed that "Petitioners literal reading of the statutory test was correct," but the language did not reflect Congress' intent, citing (at fn 3) *The Church of Holy Trinity, supra*

might help us understand (though not control our determination) what Congress had in mind *Id* at p 17

A recent paper published by a professional statistician in a peer reviewed journal one week after the January 10, 2007 oral argument, and before the ruling of this Court, contains a detailed analysis of the Impact Aid statute focusing on what disparity formula is required by the statute That analysis flatly rejects the Secretary's formulation

On January 15, 2007, five days after oral argument, Professor Joseph L Gastwirth, Ph D, Department of Statistics, George Washington University, Washington, D C ,[4] published his paper on line in the Journal of Law, Probability and Risk (http //lpr oxfordjournals org/cgi/content/abstract/5/1/33) It is entitled "A 60 Million Dollar Statistical Issue Arising in the Interpretation and Calculation of a Measure of Relative Disparity Zuni Public School District 89 v U S Department of Education "[5]

The paper addressed and rejected the two underpinnings of the majority's later opinions First, it confirms that

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[5] (Law, Probability and Risk (2006), Vol 5, 33-61 Advanced Access publication on January 15, 2007) The research was conducted independently of both sides in this litigation However, as reflected in Dr Gastwirth's acknowledgments, both sides of this litigation did respond to Dr Gastwirth's request for material Dr Gastwirth's 1988 publication cited in fn 28 of his paper has been cited by the Federal Judicial Center's Reference Manual on Scientific Evidence http //www fjc gov/public/pdf nsf/looku/sciman00 pdf/$file/sciman00 pdf

Congress' statutory formula is explicit and self-contained and that the Secretary's formula cannot be reconciled with the statute Second, it dispels the assumption that the Secretary's formula is so superior to the statutory formula that Congress' views on the issue as expressed in the statute should be disregarded

Dr Gastwirth thoroughly examined the statutory interpretation issues presented in this case "from the perspective of a statistician " Gastwirth, *supra*, at p 4 He conducted one informal survey of statisticians and another survey of seminar attendees at his talk in September of 2006 at Columbia University on how they would read and interpret the statutory formula if called upon to implement it and "virtually all agreed, conceptually, with the Plaintiffs' primary interpretation and the dissenting opinion by Judge O'Brien," from the Tenth Circuit's vacated original opinion *Id* at p 4 *See, Zuni Public School District No 89 v U S Dept of Education, et al* , 393 F 3d 1158 (10th Cir 2004) (vacated) (Pet App 22a-33a) Dr Gastwirth was clear that "the [Secretary's] regulation emphasizes that percentiles will be determined on the basis of number of pupils and not on the number of districts" and that "the number of pupils in a district is not mentioned in the new statute, much less used to determine the 5th and 95th percentiles " *Id* at p 6 He explains his analysis as a statistician

> To a statistician, the statute specifies a population of LEAs, the individual units, and the characteristic of interest is the average per-pupil expenditure (AE) of the LEA By arranging the LEAs in increasing order of the[illegible]enditures, we obtain the distribution of the AEs in [illegible]e universe of LEAs in the state (see Appendix A for details) The disparity calculation is made by first taking difference, D, say, between the

> 95th percentile ($E_{0\,95}$) and the fifth percentile ($E_{0\,05}$) of the AEs of the LEAs The 95th and 5th percentiles are used in the calculation as the statute clearly states that LEAs with expenditures (or revenues) *above* the 95th percentile or *below* the 5th percentile should be disregarded Then the disparity measure is the ratio of D to $E_{0\,05}$ Since one has data for the entire population, one determines the percentiles from the formula appropriate for the data from the complete population *Id* at p 9

Dr Gastwirth then explains that both the statutory formula and the Secretary's regulation formula have flaws depending upon the number of LEAs, the size of the LEAs and the ranking of the LEAs (*Id* at p 10 and p 16) He then poses rhetorically "if Congress wanted to use the pupil population in the various districts to contribute to the disparity measure, one can ask why it did not use the [average per-pupil expenditure] in the State as the denominator of the measure " *Id.* at p 10

Dr Gastwirth also suggests that since the 1994 statute allowed "the Department to adjust the expenditure data to account for special situations many 'anomalous' aspects of the data should be removed in this process Hence, one might question whether any of the adjusted data should be deleted " This in turn throws into question the regulation formula which in New Mexico eliminates 24% of the LEAs from the calculation, a draconian trimming within its context Again, at page 11, Dr Gastwirth commented that his informal surveys of statisticians provided "some insight into the way statisticians react to the statute and indicates that the description given at the beginning of the section is quite standard " Dr Gastwirth points out that the DOE alternative formula itself allows "a very large disparity in one category

of schools to be masked by small disparities in other categories " He then asks, again rhetorically "Given the purpose of the federal government's funding of education in impacted areas, did Congress intend that a statute with the objective of insuring that a state has an equalization program and does not even mention grade levels allow one large category of schools (or districts) to have a disparity greater than 50% " *Id* at p 14 Further, use of data on per-student expenditures or revenues by school would far more accurately reflect a true disparity measure, which "undercuts the argument" that the regulation formula "reflects an approximation of the true disparity in per-pupil expenditures in the state " (*Id* at p 15)

Dr Gastwirth again questions (*Id* at p 16) the appropriateness of the regulation's formula, as given the elimination of anomalies allowed by the statute " the per pupil expenditures should be reasonably equal if the state had an equalization program in effect " (New Mexico has more than a 200% disparity between the top ranked LEA and lowest ranked LEA after anomalies are eliminated) Pointing further to problems with both Congress' and the Secretary's formula, Dr Gastwirth notes that "since the true equalization program should be concerned with the funds available to educate children in the poorest districts, the deletion of the lowest 5% of the adjusted revenue or expenditure data appears inconsistent with the stated purpose of the law " *Id* at p 16 Without knowing of Justice Breyer's wish for professional assistance, Dr Gastwirth coincidentally offers it *Id* at p 19 Again, the clarity of the statutory formula is reinforced

> Since the new law specifies the disparity formula, rather than preserving the wording of the department's previous formula, the weight that should be given to

> the department's unchanged interpretation of the disparity calculation is a legal issue If the court decides that the definition of a percentile is considered a term of art, then the interpretation given by professional statisticians and statistical textbooks and treatises should be seriously considered In our informal survey and discussion at a seminar at Columbia University, statisticians do not have much difficulty in interpreting the pertinent part of the statutory formula *Id* at p 19

Dr Gastwirth then highlighted a variety of problems with the Secretary's formula as set out in the 1996 regulations "The DOE formula can also fail to remove data from LEAs with anomalous characteristics " *Id* at p 19 "The alternative calculation proposed by DOE that combines the disparities for LEAs with the different grade-level groupings tends to decrease the calculated disparity Thus, it is easier for a state in which school districts are organized by grade levels to pass the criterion " *Id* at p 19 Further, "the use of highly aggregated data to assess per pupil expenditure inequality leads to an under-estimate of the inequality and per-pupil expenditures " *Id* at p 20 Again, Dr Gastwirth notes the inequity in deleting the lowest 5% of the data (a problem with both formulas) "if one desires to insure a basic minimum education for all pupils " Citing the relevant statistical literature, Dr Gastwirth comments that the data itself is skewed rather than symmetrical, making a symmetrical trimming "not appropriate for assessing spread or relative disparity " *Id at p 20*

Dr Gastwirth concludes by questioning the value and legitimacy of the regulation formula

> While it is unreasonable to expect the formulas stated in either the 1976 or the current DOE regulations to be perfect, the fact that there are several statistically questionable aspects suggests that in using its expertise the department did not make a thorough examination of the relevant statistical literature If courts are to defer to the "expertise" of a governmental agency when interpreting a statute, at a minimum they should check that a reasonable degree of expertise is reflected in the regulations *Id* at p 20

The conflict between the clear and compelling arguments of Justice Scalia's dissent and the claim of the majority of having divined a Congressional intent not reflected in any legislative or regulatory history or statutory language can only be reconciled by concluding that the majority believes that the regulation formula is rescued by some overpowering public policy furthered by the regulation which the Congress' formula fails to advance Perhaps if this were true, and if we had a different system of government founded on *The Church of the Holy Trinity* by which the Justices of this Court (or the Secretary) were free to substitute their judgments for that of the Congress, the majority's decision might be justified But as clearly shown by Dr Gastwirth's analysis this is not one of those instances, as the regulation formula is flawed conceptually and in practice and certainly does not justify the wound which the majority inflicts upon *Chevron* Congress should be taken at its unambiguous word

CONCLUSION

Petitioners respectfully pray that this Court grant reconsideration of this matter and reject the Secretary's formula as inconsistent with the statute

Respectfully submitted,

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CERTIFICATION

The foregoing is restricted to the grounds specified in 44 2 S Ct R and it is presented in good faith and not for delay

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